

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 8, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Chair Khan:

The Committee on the Judiciary is conducting oversight of the Federal Trade Commission's (FTC) abuse of its statutory authorities in investigating Twitter.¹ The Committee's oversight has uncovered information suggesting that the FTC took action against Twitter in May 2022 as a result of Elon Musk's anticipated acquisition of the company. This information only reinforces the Committee's concerns about the FTC's actions and underscores the need for relevant documents to inform potential legislative reforms.

On April 12, 2023, after efforts to obtain your voluntary compliance,² the Committee issued a subpoena for documents relating to the FTC's investigation of Twitter.³ The subpoena had a return date of April 26, 2023.⁴ On April 26, you responded via letter, asserting that the FTC could not produce the subpoenaed documents because the FTC's investigation into Twitter was pending.⁵ The pendency of an administrative investigation, however, is not a valid basis for your refusal to comply with a Congressional subpoena.

¹ See Letter from Hon. Jim Jordan, Chairman, H. Comm. on the Judic., & Hon. Ted Cruz to Lina Khan, Chair, Fed. Trade Comm'n (Mar. 10, 2023). See also H. Comm. on Judiciary and Select Subcomm. on the Weaponization of the Federal Gov't, 118th Cong., Interim Staff Rep. on The Weaponization of the Federal Trade Commission: An Agency's Overreach to Harass Elon Musk's Twitter (Mar. 7, 2023).

² Although the FTC provided one narrative response to the Committee's initial letter, it has declined to produce documents. See Letter from Lina Khan, Chair, Fed. Trade Comm'n, to Hon. Jim Jordan, Chair, H. Comm. on the Judic. (Mar. 27, 2023).

³ See Letter from Hon. Jim Jordan, Chair, H. Comm. on the Judic. to Lina Khan, Chair, Fed. Trade Comm'n, at 2 (Apr. 12, 2023).

⁴ *Id.*

⁵ See Letter from Lina Khan, Chair, Fed. Trade Comm'n, to Hon. Jim Jordan, Chair, H. Comm. on the Judic. (Apr. 26, 2023).

Your reliance on *Pillsbury Co. v. FTC* for the assertion that Congressional inquiries “pose an inherent threat to” the FTC’s law enforcement mandate is misplaced.⁶ *Pillsbury*, a case from 1966, concerned statements made at Senate and House subcommittee hearings, about a matter within the FTC’s adjudicatory process, at which the FTC chairman appeared.⁷ The court noted that public advocacy by Members urging for a particular FTC outcome could affect the due process rights of a company before the Commission.⁸ Such is not the case here, and notably your use of *Pillsbury* in this context is not to protect the due process rights of Twitter but instead to shield the FTC from Congressional scrutiny.⁹ In any event, courts have held that an agency’s deliberations cannot be shielded when there is reason to believe misconduct has occurred.¹⁰

Even so, as an accommodation to the FTC, the Committee agreed to accept an initial briefing about the FTC’s actions toward Twitter, without waiving the Committee’s right to the subpoenaed documents.¹¹ The briefing occurred on May 8, 2023, conducted by [REDACTED].¹² On May 12, [REDACTED] sent a follow-up letter with additional information that the FTC could not provide during the briefing.¹³

From the FTC’s briefing and subsequent letter, it appears that the FTC acted against Twitter in May 2022 as a result of Elon Musk’s (at the time potential) acquisition of the company. According to the information provided, in October 2019, Twitter self-reported a privacy issue.¹⁴ The FTC and Twitter reached a tentative settlement agreement in [REDACTED] [REDACTED].¹⁵ At the time, Commissioner Slaughter served as the FTC’s Acting Chair. In June 2021, you

⁶ *Id.*

⁷ 354 F.2d 952, 955-56 (5th Cir. 1966) (“The alleged interference, we hasten to add, was not alleged improper influence behind closed doors but was rather interference in the nature of questions and statements made by members of two Senate and House subcommittees having responsibility for legislation dealing with antitrust matters, all clearly spread upon the record.”); *id.* at fn. 2 (“At these hearings, Mr. Howrey, the then Chairman of the Commission, and several of the members of his staff, appeared including Mr. Kintner, the then General Counsel and later Chairman of the Commission, who wrote the final opinion from which this appeal is prosecuted.”).

⁸ *Id.* at 963-64.

⁹ See *supra* text accompanying notes 5-6.

¹⁰ See, e.g., *In re Sealed Case (Espy)*, 121 F.3d 729, 737-38 (D.C. Cir. 1997) (noting that where there is reason to be believe misconduct occurred, “the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations . . . does not serve the public interest in honest, effective government” (internal quotations omitted)).

¹¹ See generally Correspondence from House Judiciary Committee staff to FTC staff (May 2, 2023).

¹² Briefing by Fed. Trade Comm’n Staff to House Judiciary Committee Staff (May 8, 2023).

¹³ Letter from Fed. Trade Comm’n Staff to House Judiciary Committee Staff (May 12, 2023). This letter asserted that “the Committee’s questions . . . fell outside the time frame of the Committee’s original request for documents and information.” This assertion is inaccurate. The Committee’s subpoena for documents covered a period beginning on April 1, 2022, more than a month before the FTC’s May 2022 Order against Twitter. [REDACTED] began the briefing, unprompted, with information dating back to 2011 and a discussion about the actions leading up to the May 2022 Order. Only after [REDACTED] made apparently inaccurate statements about the timeline did Committee staff raise the issues that led to the subsequent letter.

¹⁴ Concurring Statement of Commissioner Christine S. Wilson and Commissioner Noah Joshua Phillips, Twitter, Matter No. 2023062 at 6 (May 25, 2022).

¹⁵ Letter from Fed. Trade Comm’n Staff to House Judiciary Committee Staff (May 12, 2023).

became Chair. Despite the tentative agreement in [REDACTED],¹⁶ the Commission took no action against Twitter in 2021.

The FTC's May 12 letter provides two pretextual suggestions for why the FTC did not act against Twitter in 2021 despite the tentative agreement. First, the letter suggests your nomination in the same month that the FTC reached the tentative agreement justified then-Acting Chair Slaughter's lack of action.¹⁷ However, your pending nomination and confirmation as a Commissioner should not have affected the day-to-day operations of the FTC or the implementation of an agreed-upon settlement. Further, because your designation as Chair was reportedly a surprise decision,¹⁸ then-Acting Chair Slaughter should have had no reason to wait for your confirmation because it was not expected you would assume the role of Chair.

The letter then attempts to explain the FTC's lack of action against Twitter, after you became Chair, by suggesting the need for a stronger settlement agreement. But the letter noted in vague terms that "FTC staff determined it was unable to obtain the additional relief" through the rest of 2021, without explaining why the terms of the tentative agreement were no longer acceptable to the FTC.¹⁹ The letter continued with equally vague assertions about what happened in 2022, stating that the Bureau Director briefed the Chair in January 2022 and that "staff resolved outstanding issues" in January and February of 2022.²⁰ Ultimately, the [REDACTED] —just one day after Twitter accepted Mr. Musk's offer to buy the company.²¹

The timeline of the FTC's actions raises significant questions. A close examination of the information provided suggests that there is an unjustified approximate one-year gap in the FTC's actions with respect to Twitter. A reasonable conclusion is that neither you nor Acting Chair Slaughter seriously planned to take action against Twitter until political pressure arose given Mr. Musk's impending acquisition.²² The FTC's decision to enter the May 2022 Order after Mr. Musk's acquisition became apparent gave the FTC the power to then harass Twitter under cover of the May 2022 Order.²³ Put simply, what the Committee has learned of the FTC's actions reinforces the concern about the apparent partisan motivation behind the FTC's approach to Elon Musk's Twitter.²⁴

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Alexei Alexis, *Khan sworn in as chairwoman of FTC in surprise White House move*, POLITICO (June 16, 2021).

¹⁹ Letter from Fed. Trade Comm'n Staff to House Judiciary Committee Staff (May 12, 2023).

²⁰ *Id.*

²¹ Press Release, Twitter, Elon Musk to Acquire Twitter (Apr. 25, 2022).

²² See, e.g., Elizabeth Warren (@SenWarren), TWITTER (Apr. 25, 2022, 5:22 PM), <https://twitter.com/SenWarren/status/1518702084048179200>; Open Markets Institute, OMI Statement on Elon Musk and Twitter (Apr. 26, 2022); Jordan Boyd, *The Left Is Freaking Out Over Elon Musk Because Twitter Rigs The Game For Democrats*, THE FEDERALIST (Apr. 14, 2022); Ben Weingarten, *Elon Musk's Battle For Twitter Is A Proxy War For Americans Against The Ruling Class*, THE FEDERALIST (Apr. 20, 2022); Brian Schwartz, *Biden officials worry Musk will allow Trump to return to Twitter*, CNBC (Apr. 25, 2022).

²³ See Interim Staff Rep. on The Weaponization of the Federal Trade Commission: An Agency's Overreach to Harass Elon Musk's Twitter, *supra* note 1.

²⁴ *Cf. id.* at 1.

The FTC's compliance with the Committee's subpoena is deficient. The FTC has failed to provide a single document or communication responsive to the Committee's subpoena. The information provided to date, which the Committee accepted as an accommodation to the FTC, has only raised more concerns. The Committee expects that the FTC will promptly begin to produce material responsive to the subpoena. However, as an additional accommodation, the Committee is willing to prioritize the following categories of documents responsive to items 1 and 5 in the Committee's subpoena:

1. All recommendation memoranda provided to the FTC's Bureau of Consumer Protection and Bureau of Economics front offices or to the Commission, including drafts and final versions, relating to the investigation into Twitter's compliance with 2011 Commission Order;
2. All documents and communications referring or relating to the timing of the investigation into Twitter's compliance with 2011 Commission Order, including but not limited to the timing of potential or requested votes and recommendation memoranda; and
3. All documents and communications referring or relating to the FTC's demand that Twitter identify all journalists and other members of the media to whom Twitter allegedly granted access.

Please produce this material as soon as possible but no later than June 22, 2023, at 5:00 p.m.

The Committee remains concerned with the decision-making and internal controls that allowed for many specific demands in the FTC's investigation to be sent to Twitter, including demands targeting journalists. The information you provided suggests deficiencies in the structure of some of your investigations, including the matter the Committee is investigating.²⁵ These deficiencies are especially concerning given your actions to consolidate power in the Chair's office,²⁶ and heighten the importance of your full and complete compliance with the Committee's subpoena.

²⁵ See, e.g., Nonpublic Staff Briefing Regarding the FTC's Investigation of Twitter (Monday, May 8, 2023)

[REDACTED]

[REDACTED]

[REDACTED]

²⁶ Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Issuance of Two Omnibus Compulsory Process Resolutions (July 1, 2022) ("In its statement, the majority assures us that the omnibus resolutions 'will not substantially change the multiple layers of checks and balances that are critical to the Commission's oversight of investigations.' This assertion is baffling, as these broad resolutions eliminate the only layer of Commission oversight concerning the use of compulsory process in the vast majority of the agency's competition-related investigations.").

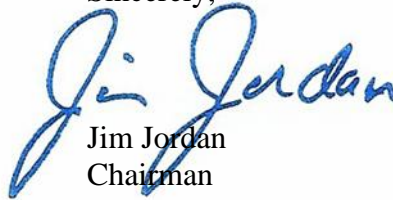
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Your compliance with the Committee's subpoena is deficient. If you continue to refuse to comply with the Committee's subpoena, the Committee may be forced to take action to enforce the subpoena, including but not limited to considering a resolution of contempt of Congress.

Sincerely,

A handwritten signature in blue ink that reads "Jim Jordan". The signature is stylized with a large "J" and a long, sweeping underline.

Jim Jordan
Chairman

cc: The Honorable Jerrold L. Nadler, Ranking Member